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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

MAE SIMS, Guardian Ad Litem
for CYNTHIA L. SIMS and BRENDA LEE SIMS,
minors, and MAE SIMS and CHERYL MAE SIMS,
individually,

Petitioners.

v.

STATE OF IDAHO; DEPARTMENT OF HIGHWAYS,
a civil administrative department of the
State of Idaho; C. ED FLANDRO,
HOWARD B. THOMASON and LLOYD F. BARRON,
Idaho Board of Highway Directors;
CARIBOU COUNTY, State of Idaho;
JACK GIBBS, IRA ELLIS and EDWIN M. SMITH,
County Commissioners of Caribou County,
State of Idaho.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF IDAHO

The Petitioners, MAE SIMS, Guardian Ad Litem for CYNTHIA L. SIMS and BRENDA LEE SYMS, minors, and MAE SIMS and CHERYL MAE SIMS, individually, pray that a Writ of Certiorari issue to review the opinion

and judgment of the Supreme Court of the State of Idaho rendered in these proceedings on June 22, 1972.

OPINIONS BELOW

The opinion of the said Supreme Court of the State of Idaho, reported at 94 Ida. ___, 498 P2d. 1274, appears at Appendix A, infra., pp 15, affirmed the unreported Orders Granting Summary Judgment of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, which Summary Judgments appear as Appendix B, infra., pp 16, and Appendix C, infra., pp 17.

JURISDICTION

The Opinion of the Supreme Court of the State of Idaho was entered on June 22, 1972. See Appendix A, infra., pp 15. This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court

is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

Where a State, by judicial fiat, abolishes the Doctrine of Sovereign Immunity (which Doctrine exempts the State from liability for damages resulting from the carelessness or negligence of its servants, agents or employees), as to the parties before the Court in the case in which the Opinion is rendered, and otherwise applies the ruling prospectively to future causes of action, but not to other parties who have cases pending in the State Courts at the time said Opinion is rendered, does such a ruling deny the right of equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States to those "other parties".

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 14:

> "Section 1. (Citizenship--Due process of law--Equal protection.)-- . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

The State of Idaho, by Judicial Opinion rendered by the Supreme Court of the State of Idaho, established the Doctrine of Sovereign Immunity early in its Statehood. See Hollister vs. State of Idaho, 9 Ida. 8, 71 Pac. 541 (1903), and Davis vs. State of Idaho, 30 Ida. 137, 163 Pac. 373 (1917). This Doctrine protected the State from liability for damages resulting from injuries suffered because of the carelessness or

negligence of its servants, employees or agents. By Judicial Opinion of the Supreme Court of the State of Idaho rendered August 5, 1970, in Case No. 10290, entitled Smith vs. State of Idaho, reported at 93 Ida. 795, 473 P2d. 937 (1970), the Doctrine of Sovereign Immunity was abolished, as to the parties to that case and as to "all future causes of action arising on or after 60 days subsequent to the adjournment of the First Regular Session of the Forty-First Idaho State Legislature unless legislation is enacted at that Session with respect to the abolition of the sovereign immunity of the State." 93 Ida. at 808, 473 P2d at 950.

Petitioners herein filed an action against the State of Idaho for damages resulting from the death of Charles L. Sims, alleging that the primary proximate

cause of the accident was slipperiness upon a highway resulting from oil coming to the surface of the road combined with recently fallen rain. The decedent was injured and died on July 15, 1969. The action was instituted on May 13, 1970. In the Trial Court, Summary Judgment was granted in favor of all Defendants. See Appendix B, infra., pp 16 and C, infra., pp 17. Said Judgment was appealed to the Supreme Court of the State of Idaho, which Judgment was affirmed on June 22, 1972, (Appendix A. infra., pp 15) relying on the Court's earlier rulings in Smith vs. State of Idaho, 93 Ida 795, 473 P2d 937, and Dawson vs. State Farm Insurance, 94 Ida. ___, 496 P2d 97 (1972), which rulings abolished sovereign immunity as to "all future causes of action" but left sovereign immunity applicable to the case at bar.

Relying upon the earlier decisions of the United States Supreme Court in Great Northern Railway Co. vs. Sunburst Oil and Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) and Linkletter vs. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d. 601 (1965), the Supreme Court of the State of Idaho determined that the prospective overruling of sovereign immunity in the Smith Case, supra., was appropriate judicial action.

REASONS FOR GRANTING WRIT

In Great Northern Railway Co. vs. Sunburst Oil & Refining Co, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), this Court ruled that the due process requirements of the U. S. Constitution were not violated by the Supreme Court of the State of Montana where that Court refused to make retroactive application of a ruling. This Court, through Mr. Justice Cardozo, stated:

"This is a case where a Court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal.

"We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. * * * On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. * * * The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts. The state of Montana has told us by the voice of her highest court, that, with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions, we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew.

Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common-law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

287 U.S. 364-366, 53 S.Ct. 148-149.

Based upon the authority of the Sunburst Decision, where this court held that the prospective or retroactive application of State court rulings was not controlled by the due process requirements of the Federal Constitution, there has been a wide divergence of approaches taken by the various states. A recent study of this situation is found in the article Prospective or Retroactive Operation of Overruling Decision, which appears in the annotation in 10 ALR3d at 1362 (1966).

It would appear that the approach taken by a court, in determining whether the

pronouncement of a principle of law should be applied prospectively or retroactively, should be controlled by the requirement of the Fourteenth Amendment to the U. S. Constitution that equal protection of the law must be maintained for all persons within the state. We recognize that reasonable classification upon some ground of difference having a fair and substantial relation to the object of legislation may be had so that all persons under similar circumstances shall be treated alike. See Barbier vs. Connally, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923. and Old Dearborn Distributing Co. vs. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109. We are here, however, not dealing with legislative classification. We are rather in the realm of judicial classification. It is a cardinal rule that equal protection

of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief, under like conditions and without discrimination. Republic Pictures Corp. vs. Koppler, (CCA8) 151 F2d 543, Aff'g 59 Fed.Supp. 112. Aff'd 327 U.S. 757, 66 S.Ct. 523, 327 L.Ed. 757; Swick vs. Glen Martin Co., 68 Fed.Supp. 863, 869.

Here we have a situation where in the case of Smith, et al vs. State of Idaho, et al, 93 Ida. 795, 473 P2d 937 (1970), in a combination of claims, one cause of action arose in April, 1967, one cause of action arose in December, 1965, and one cause of action arose in July, 1965, and the claim of Petitioners herein arose in July, 1969. Petitioners' Complaint was filed in May, 1970, and the decision of the Idaho Supreme Court

in the Smith case, supra., was rendered in August, 1970. In other words, the Petitioners herein were litigants before the court, with a claim for injuries resulting from negligence on the part of the State of Idaho in virtually an identical position and situation as the parties to the Smith et al case; and yet the Supreme Court of the State of Idaho, while allowing the parties to the Smith case to pursue their claim by abolishing sovereign immunity, barred and prevented the Petitioners herein from an equal right by otherwise abolishing the immunity in all future causes of action arising sixty days following adjournment of the next Session of the Idaho Legislature and holding that Petitioners were subject to the Doctrine of Sovereign Immunity. See Appendix A, infra., pp 15. How can it be said that Petitioners were afforded equal

protection of the law under those circumstances? Either all parties in court at the time of the rendering of the opinion abolishing sovereign immunity should be treated equally by granting all a right to pursue their various claims against the state, or they should all have been treated equally by denying to all the right to pursue said claims because of the then existing immunity on the part of the state and applying the abolition of the doctrine purely prospectively, i.e., as to all causes of action arising after the date of the decision. Any other treatment of parties-litigant who are similary situated, barring some of them from recovering under like conditions and circumstances is a denial of equal protection of the law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Idaho.

DATED This 19th day of September, 1972.

Respectfully submitted,

DERR, DERR, WALTERS & CANTRILL

By _____
Allen R. Derr, of the Firm
P. O. Box 1006
Boise, Idaho 83701

COUNSEL FOR PETITIONERS

APPENDIX A

Opinion of the Supreme Court

of the

State of Idaho

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 10864

MAE SIMS, guardian ad litem for CYNTHIA L. SIMS and BRENDA LEE SIMS, minors and MAE SIMS and CHERYLE MAE SIMS, individually, Plaintiffs-Appellants,	Boise, January Term 1972
v.	Filed: June 22, 1972
STATE OF IDAHO; DEPARTMENT OF HIGHWAYS, a civil administrative department of the State of Idaho; C. ED FLANDRO, HOWARD B. THOMASON and LLOYD F. BARRON, Idaho Board of Highway Directors; CARIBOU COUNTY, State of Idaho; JACK GIBBS, IRA ELLIS and EDWIN M. SMITH, County Commissioners of Caribou County, State of Idaho, Defendants-Respondents.	R. H. YOUNG, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. J. Ray Durtschi, district judge.

Appeal from summary judgments in favor of respondents on basis of their

reliance on doctrine of sovereign immunity.

Judgments affirmed.

Derr, Derr & Walters, Boise, for appellants

W. Anthony Park, Attorney General, Faber F. Tway, Department of Highways, Boise, and Wallace M. Transtrum, Soda Springs, for respondents.

McQUADE, C.J.

On the evening of July 15, 1969, Charles L. Sims was seriously injured and subsequently died as a result of his 1968 Dodge pickup going out of control and leaving Highway 30N in Caribou County, Idaho, approximately eight miles east of Lava Hot Springs.

Sims' surviving wife instituted an action on her own behalf and on behalf of Sims' surviving daughters as guardian ad litem against the State of Idaho, Department of Highways and against Caribou County. The plaintiffs alleged that the slick and slippery condition of the highway due

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to oil seeping to the surface of the road, combined with a recent rain, caused Sims to lose control of the pickup resulting in his death. The plaintiffs further alleged that the defendants State of Idaho and Caribou County were responsible for the care and maintenance of Highway 30N and that the defendants were therein negligent

The State of Idaho, Department of Highways moved that its prior motion to dismiss be treated as a motion for summary judgment. The motion was supported by the affidavit of the Commissioner of Insurance of the State of Idaho stating that no insurance was in effect at the time of the accident covering negligent acts of State employees or covering the Idaho Department of Highways in the design, construction and maintenance of state highways.

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Caribou County also moved for summary judgment. The motion was supported by Affidavit stating that Caribou County is a political subdivision of the State of Idaho; that the County was not responsible for maintenance of State Highway 30N and that the County was not insured against the alleged liability.

After a hearing before the trial court, both motions for summary judgment were granted on the grounds that there were no material facts at issue. The plaintiffs have appealed to this Court with the sole assignment of error being that the trial court erred as a matter of law in granting the motions for summary judgments.

In Smith v. State,[1] this Court held

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[1] 93 Idaho 795, 473 P.2d 937 (1970).

that the doctrine of sovereign immunity is not a valid defense in actions based upon tortious acts of the State or any of its departments or political subdivisions, wherein the governmental unit has acted in a proprietary as distinguished from governmental capacity. This Court held that Smith would only govern "future causes of action arising on or after 60 days subsequent to the adjournment of the First Regular Session of the Forty-First Idaho State Legislature unless legislation was enacted at that session with respect to the abolition of the sovereign immunity of the state."[2] However, the Court excepted the plaintiffs in Smith from its otherwise prospective ruling and permitted them to proceed with their claims in the district court.

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[2] 93 Idaho, at 808, (emphasis supplied).

The plaintiffs in the case at bar filed their complaint on May 13, 1970, claiming damages arising out of the accident that occurred on July 15, 1969. However, because Smith was prospective, the doctrine of sovereign immunity is a bar to recovery by the appellants because theirr cause of action arose during that period when the doctrine of sovereign immunity remained in effect.[3] The appellants contend that Smith v. State is unjust and unreasonable in precluding them from maintaining an action against the State of Idaho or one of its subdivisions. Plaintiffs urge

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[3] Sovereign immunity in Idaho dates back to Davis v. State, 30 Idaho 137, 163 P. 373 (1917) where this Court said: "The general proposition that a state cannot be sued without its consent is held by the overwhelming weight of authority." 30 Idaho 137 at 143.

that "the better reasoning and rendition of justice" would be not only to abolish sovereign immunity as to the parties in the Smith case, but to all other cases pending at the time of Smith, and to any other injured party, who was not barred by the statute of limitations.

The same issue was presented to this Court recently in the case of Dawson v. Olson v. State Farm Insurance.[4] We concluded in Dawson, as we must in the case at bar, that the doctrine of sovereign immunity, even though prospectively overruled, was the law at the time their cause of action arose and prevented plaintiffs from prevailing. As we stated in Dawson, regarding overruling prospectively except as to the litigants then at bar:

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[4] ___Idaho___, 496 P.2d 97 (1972).

> "We follow that course in this appeal, not out of insensitivity to the plaintiff's tragic loss, but because a line must be drawn somewhere, and the public body here involved legitimately relied on the existing state of the law. Absent the special consideration which may extend to a plaintiff who pioneers a successful reform in the in the (sic.) law, that reliance interest will be protected."[5]

Regarding plaintiffs' contention that the trial court also erred in granting respondent Caribou County's motion for summary judgment, this Court said in Gates v. Pickett & Nelson Construction Co.:[6]

> "That the State of Idaho and any of its subdivisions or departments, such as the Board of Highway Directors, are immune from liability for the torts of their employees unless such immunity has been waived to the extent of liability insurance obtained by the State or its subdivision, is a rule of long standing in Idaho. [Citing cases]." (Emphasis supplied).

Because the prospective overruling in Smith

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[5] 496 P.2d, at 101.

[6] 91 Idaho 836, 432 P.2d 780 (1967).

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that abolished the doctrine of sovereign immunity had not become law when the appellants' cause of action arise, Gates v. Picket & Nelson Construction Co. governs the case at bar and provides immunity for both the State of Idaho and Caribou County. It is well settled that the counties are political subdivisions of the State of Idaho[7] and therefore fall within the immunity provided its subdivisions.

The plaintiffs suggest that the prospective overruling in Smith will cause "dire constitutional issues and difficulties." In Linkletter v. Walker,[8] the Supreme Court

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[7] IDAHO CONST., art. 18 Sec. 1; Strickfaden v. Greencreek Highway Dist., 42 Idaho 738, 248 P. 456, 49 A.L.R. 1057 (1926).

[8] 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); see also Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); and see generally, Annotation, Prospective or Retroactive Application of Overruling Decision, 10 A.L.R.3d 1371, 1394.

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of the United States said regarding prospective overrulings: "Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective."[9]

Therefore, we hold that the trial court did not err in granting summary judgments for the State of Idaho, Department of Highways and Caribou County.

Judgment affirmed. Costs to respondents. McFADDEN, DONALDSON, SHEPARD, and BAKES, JJ., concur.

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[9] 381 U.S. 618 at 628.

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APPENDIX B

Judgment of the District Court

of the

Fourth Judicial District

of the

State of Idaho, Ada County

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAE SIMS, Guardian Ad Litem for CYNTHIA L. SIMS and BRENDA LEE SIMS, minor, and MAE SIMS and CHERYL MAE SIMS, individually,	)	Civil No. 44115
Plaintiffs	)	
vs.	)	
STATE OF IDAHO; DEPARTMENT OF HIGHWAYS, a civil administrative department of the State of Idaho; C. ED FLANDRO, HOWARD B. THOMASON and LLOYD F. BARRON, Idaho Board of Highway Directors; CARIBOU COUNTY, State of Idaho; JACK GIBBS, IRA ELLIS and EDWIN M. SMITH, County Commissioners of Caribou County, State of Idaho,	)	SUMMARY JUDGMENT
Defendants	)	

THIS CAUSE, Came on regularly before the court on the 17th day of November, 1970, upon defendants' State of Idaho; Department of Highways, a civil administrative department of the State of Idaho; C. Ed

Flandro, Howard B. Thomason and Lloyd F. Barron, Idaho Board of Highway Directors motion for summary judgment under the Idaho Rules of Civil Procedure, the plaintiffs being represented by Jesse R. Walters, of the firm of Derr, Derr & Walters, and the defendants, State of Idaho; Department of Highways, a civil administrative department of the State of Idaho; C. Ed Flandro, Howard B. Thomason and Lloyd F. Barron, Idaho Board of Highway Directors, being represented by Faber F. Tway and Alan K. Jeppesen; and after argument of counsel, and the court being fully advised in the premises; and it appearing that there are no material facts in dispute and that the defendants, State of Idaho; Department of Highways, a civil administrative department of the State of Idaho; C. Ed Flandro, Howard B. Thomason and Lloyd F. Barron,

Idaho Board of Highway Directors, are entitled to summary judgment;

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendants', State of Idaho; Department of Highways, a civil administrative department of the State of Idaho; C. Ed Flandro, Howard B. Thomason and Lloyd F. Barron, Idaho Board of Highway Directors, motion for summary judgment be, and the same is hereby granted and that plaintiffs' complaint herein be, and the same is hereby dismissed.

Dated this 18th day of November, 1970.

/s/ J. RAY DURTSCHI
District Judge

I hereby certify that a copy of the foregoing summary judgment was mailed to the below named attorneys at the below listed address on the 18th day of November, 1970.

Attorney: Wallace M. Transtrum, Prosecuting Attorney for Caribou County,

35 West Center, Soda Springs, Idaho 83276

Attorney: Jesse R. Walters of the firm of Derr, Derr & Walters, 817 Franklin Street, Boise, Idaho.

/s/ FABER F. TWAY
Faber F. Tway

APPENDIX C

Judgment of the District Court

of the

Fourth Judicial District

of the

State of Idaho, Ada County

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAE SIMS, et al, Plaintiffs,	)	Civil No. 44115
vs.	)	SUMMARY JUDGMENT
STATE OF IDAHO, et al, Defendants.	)	

THIS CAUSE came on regularly before the Court on the 17th day of November, 1970, at 3:30 o'clock p.m. upon the defendant's Caribou County, State of Idaho, and Jack Gibbs, Ira Ellis and Edwin M. Smith, County Commissioners of Caribou County, State of Idaho, Motion for Summary Judgment under the Idaho Rules of Civil Procedure, the plaintiffs being represented by Jesse R. Walters of the firm of Derr, Derr & Walters, and the defendants, Caribou County, State of Idaho, and Jack Gibbs, Ira Ellis

and Edwin M. Smith, County Commissioners of Caribou County, State of Idaho, being represented by Wallace M. Transtrum, Caribou County Attorney, and after argument of counsel and the court being fully advised in the premises and it appearing that there are no material facts in dispute and that the defendants, Caribou County, State of Idaho, and Jack Gibbs, Ira Ellis and Edwin M. Smith, County Commissioners of Caribou County, State of Idaho, are entitled to summary judgment;

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendants' Caribou County, State of Idaho, and Jack Gibbs, Ira Ellis and Edwin M. Smith, County Commissioners of Caribou County, State of Idaho, motion of summary judgment be, and the same is hereby granted and that plaintiff's complaint herein be, and the same is hereby dismissed.

DATED This 23rd day of November, 1970.

/s/ J. RAY DURTSCHI
J. RAY DURTSCHI
DISTRICT JUDGE

I hereby certify that a copy of the foregoing Summary Judgment was mailed to the below named attorneys at the listed addresses on the 20th day of November, 1970.

Attorney Jesse R. Walters of the firm
of Derr, Derr & Walters,
817 Franklin Street, Boise, Idaho

Attorney Faber F. Tway
P. O. Box 7129, Boise, Idaho

/s/ WALLACE M. TRANSTRUM
WALLACE M. TRANSTRUM

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of September, 1972, I mailed a true and correct copy of the within and foregoing instrument to:

W. Anthony Park
Attorney General
Statehouse
Boise, Idaho 83707

Faber F. Tway
Chief Legal Counsel
Department of Highways
3311 W. State Street
Boise, Idaho 83703

Wallace M. Transtrum
Caribou County Attorney
Caribou County Courthouse
Soda Springs, Idaho 83276

by depositing a copy thereof in the United States mail with postage prepaid thereon.

Counsel for Petitioners

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-472

MAE SIMS, Guardian Ad Litem for CYNTHIA L. SIMS and BRENDA LEE SIMS, minors, and MAE SIMS and CHERYL MAE SIMS, individually,

Petitioners

vs.

STATE OF IDAHO; DEPARTMENT OF HIGHWAYS, a civil administrative department of the State of Idaho; C. ED FLANDRO, HOWARD B. THOMASON and LLOYD F. BARRON, Idaho Board of Highway Directors; CARIBOU COUNTY, State of Idaho; JACK GIBBS, IRA ELLIS and EDWIN M. SMITH, County Commissioners of Caribou County, State of Idaho,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Respondents feel that the facts stated in the petition are adequate for the purpose and, therefore, respondents have no wish to enlarge upon them.

ARGUMENT

Petitioners concede that the question presented to this court for determination is not one of first impression. It was decided in the case of Great Northern Railroad Company v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932). The case has been recognized as a landmark decision with respect to the process of overruling established doctrines in the law. This court has reaffirmed the principle on a number of occasions, most recently in Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d. 601, 85 S. Ct. 1731 (1965); Adams v. Illinois, 405 U.S. 278, 31 L.Ed. 2d. 202, 92 S. Ct. 916 (1972); Jenkins v. Delaware, 395 U.S. 213, 23 L.Ed. 2d.

253, 89 S. Ct. 1677 (1971); and Johnson v. New Jersey, 384 U.S. 719 (1966). Inasmuch as these cases involved criminal matters and, therefore, a man's liberty, and in some his life, they would seem to be dealing with more compelling matters than those at stake in a tort action.

Be that as it may, it is clear that this court has frequently considered the question of retrospective as against prospective overruling of established doctrines and has concluded with Justice Cardozo in his opinion in the Sunburst case that "* * * The Federal Constitution has no voice upon the subject.".

A number of state courts have apparently arrived at the same conclusion in

comparatively recent decisions. See List v. O'Connor, 19 Ill.2d. 337, 167 N.E. 2d. 188 (1960); Perry v. Mt. Zion Community Unit School Dist., 30 Ill. App.2d. 307, 174 N.E. 2d. 701 (1961); Holytz v. Milwaukee, 17 Wisc. 2d. 26, 115 N.W. 2d. 618 (1962); Marshall v. Green Bay, 18 Wisc. 2d. 496, 118 N.W. 2d. 715 (1963); Hennington v. Valuch, 19 Wisc. 2d. 260, 120 N.W. 2d. 44 (1963); Balts v. Balts, 273 Minn. 419, 142 N.W. 2d. 66 (1966); Spanel v. Mound View School Dist. 621, 264 Minn. 279, 118 N.W. 2d. 705 (1962); In re Jeruzal, 269 Minn. 183, 130 N.W. 2d. 473 (1964). In another case, Molitor v. Kaneland Community Dist. No. 302, 18 Ill. 2d. 11, 163 N.E. 2d. 89, 86 ALR 2d. 469, Cert. den., 352 U.S. 968, 4 L.Ed. 900,

80 S. Ct. 955 (1959), the plaintiffs sought to have this court review the question of constitutionality of prospective overruling without success.

The Illinois court in this case quite carefully analyzed the reasons for its conclusions on this issue:

> "In here departing from stare decisis because we believe justice and policy require such departure, we are nonetheless cognizant of the fact that retrospective application of our decision may result in great hardship to school districts which have relied on prior decisions upholding the doctrine of tort immunity of school districts. For this reason we feel justice will best be served by holding that, except as to the plaintiff in the instant case, the rule herein established shall apply only to cases arising out of future occurrences. This result is in accord with a substantial line of authority embodying the theory that an overruling decision should be given only prospective operation whenever injustice or hardship due to reliance on the overruled

"decisions would thereby be averted. (Citations omitted).

"Likewise there is substantial authority in support of our position that the new rule shall apply to the instant case. (Citations omitted). At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere dictum. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

"(3) It is within our inherent power as the highest court of this state to give a decision prospective or retrospective application without offending constitutional principles. Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360."

One of the members of the Illinois

court, Mr. Justice Walter E. Shaefer, has had occasion to examine the matter of prospective as compared to retrospective overruling of legal doctrines.[1]

We call attention to this article, particularly because the basis of petitioners' argument is that they were denied equal rights with the plaintiffs involved in the case of State v. Smith, 93 Idaho 795, 473 P.2d. 937 (1970). In other words, they are saying that the law was not universally applied to all who came within the scope of its operation. With respect to this principle, Justice

[1] W. Schaefer, The Control of "Sunbursts"; Techniques of Prospective Overruling, Twenty-fourth Annual Benjamin N. Cardozo Lecture, 1967, reprinted in 42 N.Y.U.L. Rev. 637 (1967)

Shaefer says:

> "Any change in legal doctrine, interferes with the uniform operation of the law. But as Wigmore pointed out: 'Equality is something desired for the persons now under the law; it does not call for sameness of treatment between those of the present and those of the past or the future generation. Gompers need not receive equal law with Hampden or with the citizens of Utopia, provided he receives equal law with Harriman.' Equality is desired for those who are similarly situated. <u>But the person who successfully challenges existing legal doctrine can be, and has been, regarded as having thereby set himself apart</u>.
>
> "More frequently than not the strong equities that are required to persuade a court to overrule an earlier decision have enough vigor to carry all the way, so that reliance is totally disregarded and the overruling is fully retroactive. Contrasted with this alternative, the degree of disturbance of equality that is involved in the new technique has not seemed too serious. It has appealed to many state courts as a permissible way to limit the extent to which reliance is frustrated without making the court's determination

"an academic exercise; the Supreme Court of the United States has also used this technique. As Professor David Currie has said, the 'argument may be a bit intellectually untidy, but it may offer the best alternative to judicial paralysis on the one hand, and whole frustration of legitimate expectations on the other.'"[2] (Emphasis added)

Later the writer reinforces the basis of the opinion of the Wisconsin court in Molitor as well as that of the Idaho court in Smith when he says:

"Reliance takes many forms, ranging from the clear case of the contract entered into in specific reliance upon a particular decision, to tort situations in which reliance has been found in the actual or assumed failure of a defendant to insure against the newly created risk, or to investigate the accident at the time it occurred."[3]

The conclusion of all these authorities is that the parties involved in the case

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[2] Ibid, et seq. 638
[3] Ibid, et seq. 643

wherein an established doctrine is overruled are apart from all other persons. They are the ones who took the risk involved in changing a principle of law and for that they should be rewarded. Not being in the same category, the other persons are deprived of nothing when they do not receive the same treatment. For that reason there is no denial of equal protection of the law under the Fourteenth Amendment or any other constitutional provision.

Petitioners make the statement that "It is a cardinal rule that equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief, under like conditions and without discrimination."

and cite the case of Republic Pictures Corporation v. Koppler, (CCA 8) 151 F.2d. 554, Aff'g 59 Fed. Supp. 112. Aff'd 327 U.S. 757, 66 S. Ct. 523, 327 L.Ed. 757, and Swick v. Glenn Martin Co., 68 Fed. Supp. 863, 869.

These two cases involve situations where the state attempted to establish different limitation periods for actions brought under federal law than under state law, and the courts held, quite understandably, that there was a denial of equal protection. This was a permanent classification of litigants in which those seeking relief under a federal statute were treated differently from those seeking virtually the same relief under a state statute. The difference in the case at bar is that

an established doctrine of law was abrogated and the effect of such abrogation was postponed to a determinable date in the future. Those involved in the case were permitted to pursue their remedy for two reasons: (1) So that the new rule announced would not be mere dictum; and, (2) That the plaintiffs might receive some compensation for their efforts in bringing the suit and overturning an existing rule of law.

CONCLUSION

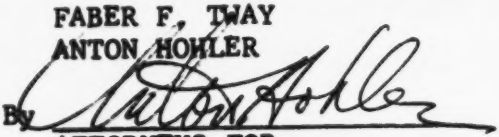
The petitioners here did not stand in the same circumstances as the plaintiffs in the case of Smith v. State and there is no denial of equal protection under the Constitution of the United States of America. For

this reason petitioners' petition for a writ of certiorari should be denied.

Dated this 10th day of October, 1972.

Respectfully submitted

FABER F. TWAY
ANTON HOHLER

By 

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CERTIFICATE OF MAILING

I hereby certify that on the 11th day of October, 1972, I mailed a true and correct copy of the within and foregoing brief in opposition to petition for writ of certiorari to:

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by depositing a copy thereof in the United States mail with postage prepaid thereon.

Anton Hohler

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